No. 18-60606

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; SIERRA CLUB,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW WHEELER, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents

On Petitions for Review of a Final Action
of the United States Environmental Protection Agency

REPLY BRIEF FOR TEXAS PETITIONERS

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Legislative and Regulatory Materials:

Other Authorities:

INTRODUCTION

In their opening brief, the Texas Petitioners quoted the relevant language of 42 U.S.C. § 7407(d), the Clean Air Act provision governing area designations, and carefully described the roles that language assigns the States and EPA. Texas Opening Br. 4-6. To recap, section 7407(d)(1)(A) gives States the power to make initial area designations. Subsections 7407(d)(1)(B)(i) and (d)(2)(A) require EPA to promulgate the States' initial designations by publishing them in the Federal Register. Section 7407(d)(1)(B)(ii) creates an exception to EPA's general duty to promulgate the States' designations. The exception applies when EPA concludes that modification of a State's designations is "necessary." 42 U.S.C. § 7407(d)(1)(B)(ii). By contrast, EPA may promulgate the designations it considers "appropriate" only when a State fails to make its own designations. *Id.*

The two-step designation process, the presumption that EPA will promulgate the States' designations as initially submitted, and the necessity-based exception to that general rule are all part of the Clean Air Act's broader structure of cooperative federalism. *See* Texas Opening Br. 2-4, 6, 16-17, 21-22. Under that structure, States play the primary role. EPA acts as a backstop to ensure that the statute's requirements are met. Only when a State elects not to participate in the process may EPA take whatever action it considers appropriate.

As to Bexar County, the EPA action at issue here—Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards—San Antonio, Texas Area, 83 Fed. Reg. 35,136 (July 25, 2018) ("the Challenged Action")—exceeded the permissible bounds of EPA's role under that statutory design. It treated

Texas's designations as mere "recommendations." *Id.* at 35,138. And although it stated that EPA may modify state designations "that are inconsistent with the statutory language," *id.*, it misapplied that language.

As explained in the Texas Petitioners' opening brief (at 11-12), EPA modified Texas's Bexar County attainment designation based on its bright-line understanding of section 7407(d)(1)(A)(i). That provision principally defines a nonattainment area as one that "does not meet" a national ambient air quality standard ("NAAQS"). According to EPA, that present-tense language precluded consideration of photochemical modeling data that Texas relied on indicating that Bexar County would attain the NAAQS within three years without federal intervention. Because data from air-quality monitors reflected that Bexar County was in violation of the 2015 ozone NAAQS, EPA found it necessary to modify Texas's designation from attainment to nonattainment.

EPA's analysis failed to account for the Dictionary Act's instruction that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. In this circumstance, that provision applies to expand the present-tense "meets" in section 7407(d)(1)(A)(ii) to include "will meet" within the timeframe relevant here. *See* Texas Opening Br. 23-24 (explaining the limits of the Texas Petitioners' argument). The present-tense "does not meet" in section 7407(d)(1)(A)(i) is just the converse of the present-tense "meets" in section 7407(d)(1)(A)(ii). The Dictionary Act applies equally to both in this scenario. For that reason, EPA could

not validly modify Texas's Bexar County attainment designation without analyzing the modeling data on which Texas relied.

But EPA did not analyze that data as to Bexar County, much less analyze it and explain why it did not support the air-quality prediction it made for Bexar County. *See id.* at 29. Indeed, EPA's then-acting administrator stated in a press release that EPA expected the modeling's prediction to prove true. *See id.*

In its response brief, EPA doubles down on its counter-textual position that States make mere recommendations as to area designations, rather than initial designations that EPA is presumptively required to promulgate. It challenges the distinction between "necessary" and "appropriate" in section 7407(d)(1)(B)(ii). It attempts to cabin the Clean Air Act's cooperative federalism in a way that Congress did not. And in defending its exclusive reference to monitoring data when deciding whether to modify Texas's Bexar County attainment designation, it presents several flawed responses to the Texas Petitioners' reliance on the text of section 7407(d)(1) and the Dictionary Act.

The Sierra Club and the Environmental Defense Club, as respondents-intervenors (the "Environmental Intervenors" or "SC/EDF"), misquote the language of section 7407(d)(1) and attempt to add words that Congress did not. They refuse even to acknowledge the statute's use of "appropriate" as a contrast to "necessary." They offer no viable contextual argument against the Dictionary Act's application in this circumstance. And they wrongly claim that EPA considered the validity of the modeling data when determining whether to modify Texas's Bexar County attainment designation.

At its core, this appeal presents two competing visions of the Clean Air Act. The Texas Petitioners' view adheres to the language of the statute: the State has authority to make designations, and EPA may override those designations only when "necessary." EPA and the Environmental Intervenors ask the Court to ignore the statutory term "necessary" and treat a State's designations as mere recommendations that EPA is always free to override. That vision is not the law.

ARGUMENT

I. EPA Erroneously Concluded That Modification of Texas's Bexar County Attainment Designation Was Necessary.

A. Under section 7407(d)(1), States make designations, not recommendations.

On the question of whether section 7407(d)(1) calls for States to make designations or mere recommendations, there is not room for serious debate. In describing state designations, section 7407(d)(1)(A) uses the words "initial designations" and "designating." Section 7407(d)(1)(B)(i) uses the word "designations." No form of the word "recommend" appears in any portion of section 7407(d)(1). *Cf.* 42 U.S.C. § 7407(d)(7)(B) (referencing "recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996").

EPA and the Environmental Intervenors offer several responses. None overcomes the statutory text.

EPA first downplays the States' role in the designation process. Its initial descriptions of that process barely acknowledge section 7407(d)(1)(A). *See* EPA Br. 3-4, 9; *see also* SC/EDF Br. 3, 5-6, 22, 25 (wrongly suggesting that section 7407(d)(1)(A) calls on EPA, rather than States, to make area designations). EPA

later recognizes that provision and even quotes the "initial designations" language in its heading. EPA Br. 12, 45. Yet EPA is quick to add that a State's designations "function as recommendations to EPA, which is the body expressly directed to make the actual designation." *Id.* at 12-13; *see id.* at 44-45; *accord* SC/EDF Br. 14. But again, "recommendations" does not appear in section 7407(d)(1). Nor does "actual designation." Section 7407(d)(1)(B)(i) directs EPA to "promulgate" *the States'* "designations." *Cf.* SC/EDF Br. 5 (purporting to quote a word—"designate"—that does not appear in section 7407(d)(1)(B)(i)).

Promulgation is a ministerial task. As the D.C. Circuit has explained, "[i]f [EPA] does not define the term by regulation and if the statute supports (or at least does not foreclose) the interpretation, 'promulgation' is accorded its 'ordinary meaning'—i.e., publication in the *Federal Register.*" *Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1093 (D.C. Cir. 1997). Here, the statute supports that ordinary meaning. Section 7407(d)(2)(A) requires EPA to "publish a notice in the Federal Register promulgating any designation under [section 7407(d)(1)]." A State's designations "function as recommendations," EPA Br. 12, only to the extent that EPA does not recognize the distinction between "necessary" and "appropriate" in section 7407(d)(1)(B)(ii). *See, e.g.*, EPA Br. 13, 45; *infra* Part I.B.

In actuality, the structure that section 7407(d)(1) establishes for area designations parallels the structure that section 7410 establishes for NAAQS implementation plans. *See* Texas Opening Br. 4. EPA concedes that, under the latter provision, it "must approve" a state implementation plan that meets the Clean Air Act's requirements. EPA Br. 14 (citing 42 U.S.C. § 7410(k)(3); *Union Elec. Co. v. EPA*, 427

U.S. 246, 251 (1976)). So must EPA promulgate a State's designations if they comply with the statute. EPA's effort to limit the primacy of the State's role to implementation of control measures under section 7410 overlooks subsections 7407(d)(1)(A) and (B)(i), which task States with "designating" "all areas (or portions thereof)" and require EPA to "promulgate the designations" that States submit, subject only to the "necessary" exception in section 7407(d)(1)(B)(ii).

EPA accuses the Texas Petitioners of overlooking the "express language," "actual wording," and "plain text" of the statute. EPA Br. 20, 47, 48. But EPA fails to say what language it is talking about. No such language exists.

EPA and the Environmental Intervenors do correctly note that Texas's own prior statements, including statements that appear in this record, align with EPA's longstanding "recommendation" gloss on section 7407(d)(1)(A). EPA Br. 20, 46-47; SC/EDF Br. 14-16. As the Texas Petitioners previously acknowledged, Texas and other States, their environmental agencies, and courts have all followed EPA's lead in using that inaccurate shorthand in the past. *See* EPA Br. 45-46 (quoting Texas Opening Br. 20). But States should be applauded, not criticized, for correcting past misstatements. The Texas Petitioners now request an opinion from this Court that replaces the misleading vernacular with the language Congress used.

B. The word "necessary" in section 7407(d)(1)(B)(ii) limits EPA's modification power.

The Court should reject EPA's effort to blend the distinct meanings of "necessary" and "appropriate" in section 7407(d)(1)(B)(ii). In making that request, the Texas Petitioners are not seeking either to "suppl[y] [their] own definition of when

it is . . . 'necessary'" for EPA to modify a State's area designation or "to transform a state's [initial designation] into a presumed final designation that EPA may modify only under extreme circumstances (or not at all)." EPA Br. 20, 47. Instead, the Texas Petitioners are relying on dictionary definitions that reflect the common meaning of the words "necessary" and "appropriate." Texas Opening Br. 18-19.

Those words reinforce the Clean Air Act's cooperative federalism as it operates in the area-designation process. Contrary to EPA's assertion (at 44), the Texas Petitioners do not assert that a State's designations are "binding" on EPA. As already noted, section 7407(d)(1)(B)(i) creates a presumption that EPA will promulgate a State's designations, but EPA may overcome that presumption by showing that the statute necessitates modification. The standard EPA must meet is "necessary," not merely "appropriate." *See* Texas Opening Br. 5-6, 17-22. In short, when a State turns in its homework, EPA grades that work under a "necessary" standard; EPA may take "appropriate" action only when a State turns nothing in. 42 U.S.C. § 7407(d)(1)(B)(ii).

The Environmental Intervenors argue that "[i]t would be a meaningless formalism to seek public comment on a state designation that is as final as Texas claims its recommended designations to be." SC/EDF Br. 16-17. That is not correct. As just explained, the States' designations are not "final" designations. They are initial designations, subject to EPA modification when necessary to ensure compliance with the statute's requirements. Although notice and comment is not required in this setting, it can help EPA identify noncompliance with the statute's requirements. *See* EPA Br. 13 (citing 42 U.S.C. § 7407(d)(2)(B)).

In making these observations, the Texas Petitioners are not "fall[ing] back on overly generalized characterizations of cooperative federalism." *Id.* at 47. They are focusing on the text of section 7407(d)(1). Texas Opening Br. 17-22. And again, just because Congress "chose to give states considerable responsibility in the NAAQS process at . . . the implementation stage," EPA Br. 48, does not diminish the primacy of the States' role at the designation stage. *See supra* pp. 5-6. Section 7407(d)(1)(B)(ii)'s restriction on EPA's modification power is no more "stringent," EPA Br. 49, than section 7410(k)(3)'s restriction on EPA's power to disapprove a state implementation plan. In both instances, EPA may override a State's action only if the statute so requires.

EPA's argument that "there is no real distinction" between "necessary" and "appropriate" in section 7407(d)(1)(B)(ii), EPA Br. 50 n.13, should set off alarm bells for even a half-hearted textualist. As the Supreme Court has observed in the Clean Air Act context, those two words have different meanings. *See* Texas Opening Br. 18 (citing *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015); *Union Elec.*, 427 U.S. at 263). And Congress's use of "inappropriate" in section 7407(d)(1)(B)(ii), *see* EPA Br. 50 n.13, does not advance the ball for EPA. A modification is inappropriate if it is not necessary.

As expected, EPA relies on the D.C. Circuit's opinion in *Catawba County v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) (per curiam) (cited in EPA Br. 50-51). But that opinion did not address the argument presented here, and it overlooked the distinction between "necessary" and "appropriate" that the Supreme Court has recognized. Indeed, although the D.C. Circuit block-quoted most of section

7407(d)(1)(B)(ii), it omitted the sentence that contains "appropriate." *Catawba County*, 571 F.3d at 26. The same is true of *Pennsylvania, Department of Environmental Protection v. EPA*, 429 F.3d 1125, 1126-27 (D.C. Cir. 2005) (cited in EPA Br. 51).

In similar fashion, the Environmental Intervenors give "necessary" a "broad authority" gloss and fail to acknowledge Congress's contrasting use of "appropriate." SC/EDF Br. 6. They also incorrectly suggest that, in prior litigation, Texas took the position that section 7407(d)(1)(B)(ii) gives EPA "boundless override discretion." *Id.* at 16 n.8. In fact, Texas argued that EPA "*claim[ed]* boundless override discretion." Final Joint Brief of the State and County Petitioners at 48, *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015) (No. 12-1309) (emphasis added). The point was that EPA was reading "necessary" too expansively. It still is.

If section 7407(d)(1)(B)(ii) did not juxtapose "necessary" with "appropriate," EPA would at least have an argument that "necessary" is an ambiguous term that could be given a relaxing administrative massage. *See* EPA Br. 50. *Cf. infra* Part I.D. But section 7407(d)(1)(B)(ii) does juxtapose those words, leaving no ambiguity gap. *See* SC/EDF Br. 11, 25 (describing the relevant portion of the statute as unambiguous).

Moreover, the Environmental Intervenors' argument about EPA's modification power is contrary to the statutory design. Congress instructed EPA to promulgate the States' designations "as expeditiously as practicable." 42 U.S.C. § 7407(d)(1)(B)(i). If EPA could make whatever designations it deemed appropriate even when a State had made initial designations, *see* SC/EDF Br. 16, section

7407(d)(1)(A) would merely delay the designation process. And the Environmental Intervenors' focus on the word "deems" in section 7407(d)(1)(B)(ii), SC/EDF Br. 17 n.9, is unhelpful. In this context, "deems" just means "considers." *See* Black's Law Dictionary 504 (10th ed. 2014) (defining the relevant sense of "deem" as "[t]o consider, think, or judge <she deemed it necessary>" and providing further explanation of this usage).

Comparing the record here with a hypothetical alternate record illustrates the practical distinction between "necessary" and "appropriate." Because Texas designated Bexar County an attainment area based on modeling, EPA was required to assess whether it was "necessary" to modify Texas's designation because that modeling did not support an attainment designation. But if Texas had instead declined to submit a Bexar County designation and EPA was not otherwise made aware of the modeling, it would likely have been "appropriate" for EPA to rely on monitored data to designate Bexar County a nonattainment area.

But Texas did submit a Bexar County designation based on modeling, and EPA relied only on monitored data. *See* EPA Br. 5. Because the Dictionary Act's tense provision applies in this circumstance, *see* Texas Opening Br. 23-28, EPA needed to go further, determining whether the modeling did or did not support Texas's air-quality prediction. *See infra* Part I.C. Texas is not seeking "special" or "unlawful" treatment. SC/EDF Br. 3. It is asking the Court to recognize how the designations process works and to ensure that EPA conducts a proper modification review.

The suggestions that EPA already considered the modeling data in connection with Bexar County, *see* EPA Br. 5, 53-54; SC/EDF Br. 25-28, are contrary to the

record. EPA admits that modeling can be relevant when determining area boundaries. EPA Br. 53-54; *see* SC/EDF Br. 25, 26 (citing C.I. No. 61, Attachment 3 at 12; C.I. No. 428 at 20-22). EPA also notes that, in support of its boundary analysis, the Sierra Club relied on the same modeling report it challenges in this portion of the case. *Id.* at 86 (citing Sierra Club Opening Br. 4, 14). But EPA clearly stated at the administrative stage that it could not and did not consider modeling when assessing Texas's Bexar County area designation. C.I. No. 427 at 7, 10, 11 (EPA's response to comments); C.I. No. 428 at 1, 6, 8, 9, 20 (EPA's final technical support document); *see* 83 Fed. Reg. at 35,137 (reflecting that the relevant portion of the Challenge Action was based only on "the most recent 3 years of certified ozone air quality monitoring data (2015–2017)"). *Cf.* SC/EDF Br. 25 (wrongly accusing the Texas Petitioners of failing to cite the record on this point). "[D]escrib[ing]" the modeling, SC/EDF Br. 26, is very different from analyzing it and explaining how (if at all) it is flawed.

In its brief to this Court, EPA belatedly provides a limited critique of the modeling. EPA Br. 55. The Environmental Intervenors try to supplement that critique. SC/EDF Br. 11-12, 26-27 & n.19. But they cite only one of their own administrative comments on this point. *Id.* at 27 n.19 (citing C.I. No. 356). EPA did not embrace those comments, conduct its own analysis of the Bexar County modeling, or "determine[] that the statute does not require it to look to future predictions of attainment in the face of present, unchallenged monitoring data." EPA BR. 56; *accord* SC/EDF Br. 28. EPA determined that the statute *forbids* it to look to future predictions of attainment. *E.g.*, C.I. No. 427 at 11.

There is reason to believe that, if EPA *had* considered the modeling, it would have credited the Bexar County 2020 attainment prediction. *See* Texas Opening Br. 29 (quoting the statement of EPA's then-acting administrator); EPA Br. 91 (relying on the same report in response to one of the Sierra Club's arguments). But at this point, all the Court need conclude is that EPA erroneously excluded the modeling data from the scope of its modification review.

All that said, EPA ultimately does not deny that "necessary" in section 7407(d)(1)(B)(ii) authorizes it to modify state designations "that are inconsistent with the statutory language," making modification "necessary" in the dictionary-definition sense of that word. 83 Fed. Reg. at 35,138 (quoted in EPA Br. 51); *see* Texas Opening Br. 18-19; EPA Br. 52 (quoting Black's Law Dictionary 1192 (10th ed. 2014), which defines "necessary" as "1. That is needed for some purpose or reason; essential <three elements necessary to meet standing requirements>. 2. That must exist or happen and cannot be avoided; inevitable <necessary evil>."). The real question is whether the Dictionary Act applies to make the present tense include the future tense in this scenario. Answering that question will determine whether EPA was required to analyze, rather than ignore as irrelevant, the modeling data on which Texas relied.

C. In light of the Dictionary Act, EPA has not shown that modification of Texas's Bexar County attainment designation was necessary.

It is undisputed that, at the time Texas designated Bexar County attainment, two Bexar County air-quality monitors reflected a NAAQS violation. *See* EPA Br. 38. But the Texas Petitioners are not arguing that section 7407(d)(1)(A)(ii) "does

not mean what it says." *Id.* Their argument is that the Dictionary Act informs what that provision means in this instance. Texas Opening Br. 23-28.

EPA and the Environmental Intervenors respond with assertions of waiver and arguments on the merits. Each fails.

1. The Texas Petitioners have not waived any argument.

EPA argues that the Texas Petitioners waived their argument that the Dictionary Act allows for reliance on future predicted attainment in this circumstance. EPA Br. 59-61. Both EPA and the Environmental Intervenors also argue that the Texas Petitioners needed to challenge "40 C.F.R. Pt. 50, Appendix U, which was published in the Federal Register in 2015. 80 Fed. Reg. 65,458 (Oct. 26, 2015)." *Id.* at 44; *see* SC/EDF Br. 1, 2, 18 n.10, 22-23. They are wrong on both counts.

a. True, the Texas Petitioners did not cite the Dictionary Act at the administrative stage. But in its comments, Texas unquestionably told EPA that it should designate Bexar County attainment, citing section 7407(d)(1) and the modeling of future conditions that it contended supported its Bexar County attainment designation and reflected that EPA could not properly modify that designation. C.I. No. 297 at 3-4; C.I. No. 364 at 1-4.

Those comments fulfilled the purpose of 42 U.S.C. § 7607(d)(7)(B)'s preservation requirement, which in this circumstance was to put EPA on notice that it was required to consider the substance and validity of the relevant modeling data. *See, e.g.*, *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817-18 (D.C. Cir. 1998) (per curiam). EPA cannot credibly contend that it was unaware of Texas's position on this point.

Nor can EPA claim ignorance of the Dictionary Act. It applies, after all, to "any Act of Congress," 1 U.S.C. § 1, and courts "must consult" it when determining the meaning of a federal statute. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014). The Dictionary Act does not "modif[y] . . . the express language of" a federal statute. EPA Br. 60. It informs the meaning of that language. *E.g.*, 1 U.S.C. § 1 (explaining what "the words 'person' and 'whoever'" encompass).

EPA knew this at the relevant time. In a 2010 case involving 42 U.S.C. § 7414(a)(1), the Clean Air Act provision authorizing EPA to investigate "whether any person is in violation" of certain requirements, EPA told the district court that the defendants' "cramped reading of Section [7414(a)(1)] ignores the Dictionary Act. . . . Section [7414(a)(1)]'s authorization to seek information about 'whether any person is in violation' of the Act includes the authority to inquire about whether any person *will be* in violation of the Act." Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 15-16, *United States v. Xcel Energy, Inc.*, 759 F. Supp. 2d 1106 (D. Minn. 2010) (No. 0:10-cv-02275-PAM-JSM), ECF No. 8 ("EPA's *Xcel* P.I. Memorandum") (emphasis altered).

And of course, EPA specifically responded to Texas's contention based on future modeling data. It stated that the language of section 7407(d)(1) put that data outside the scope of its modification review. C.I. No. 427 at 7, 10, 11. The relevant "questions of law," *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 828 (5th Cir. 2003) (cited in EPA Br. 61), were what section 7407(d)(1) allowed and required in this circumstance. Texas pressed those questions, and EPA passed on them.

b. The waiver arguments based on failure to challenge Appendix U also lack merit. Appendix U "explains the data handling conventions and computations necessary for determining whether the [ozone NAAQS] are met at an ambient [ozone] air quality monitoring site." 80 Fed. Reg. at 65,458.

The Texas Petitioners are not challenging those data-handling conventions or computations. They do not dispute that, under those conventions and computations, the NAAQS were not met in Bexar County at the time Texas made its designation. Nor do they dispute the broader point that those conventions and computations are what guide analysis of monitored data.

The Texas Petitioners are instead arguing something beyond the scope of Appendix U: that data from air-quality monitors is not always (and not here) the entire universe of information relevant to an area designation under section 7407(d)(1). Again, there is no question that Texas made that position known at the administrative stage with respect to Bexar County. *See* C.I. No. 297 at 3-4; C.I. No. 364 at 1-4.

2. EPA's and the Environmental Intervenors' responses on the merits fail.

Turning to the merits, EPA first argues that the Dictionary Act does not alter the present-tense language of section 7407(d)(1)(A)(ii). EPA Br. 62-64. It then argues that, even if the Act's tense provision does apply to section 7407(d)(1)(A)(ii) in this instance, an attainment designation under that section would have to be based on data reflecting both present and future attainment. *Id.* at 65. Each argument fails.

a. As an initial matter, EPA overstates the reach of the Texas Petitioners' argument. A State may not, in all circumstances and without qualification, "establish attainment with an existing NAAQS if it can show that it will attain the NAAQS in

the future." EPA Br. 59; *see* SC/EDF Br. 24-25 (similar overstatement). The Texas Petitioners' argument is more limited, focusing on the scenario presented here. *See* Texas Opening Br. 23-24.

And the argument is not that the Dictionary Act renders any language in section 7407 ambiguous. *Cf. Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 775 (9th Cir. 2008) (cited in EPA Br. 62). Consistent with *Hobby Lobby* and *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115, 125 (2d Cir. 2008), the Texas Petitioners argue that the Dictionary Act presumptively makes "meets" in section 7407(d)(1)(A)(ii) also mean "will meet" in this scenario. Texas Opening Br. 23-28. *Cf.* SC/EDF Br. 6, 25 (improperly attempting to add a word—"currently"—to section 7407(d)(1)(A)). The Ninth Circuit's statement in *Guidiville* that "it is not apparent why the Dictionary Act must even be consulted," 531 F.3d at 776, is inconsistent with the Supreme Court's subsequent "must consult" directive in *Hobby Lobby*, 573 U.S. at 707.

United States v. Wilson, 503 U.S. 329 (1992), and *Carr v. United States*, 560 U.S. 438 (2010) (cited in EPA Br. 62), do not support EPA's argument. The statute at issue in *Wilson* cast verbs in the past and present perfect tenses, 503 U.S. at 333, so the Dictionary Act's tense provision was inapplicable. *See* 1 U.S.C. § 1 (providing that "words used in the *present* tense include the future as well as the present" (emphasis added)). And in *Carr*, the Court concluded that, "[b]y implication, . . . the Dictionary Act instructs that the present tense generally does not include the past." 560 U.S. at 448; *accord United States v. Marsh*, 829 F.3d 705, 709 (D.C. Cir. 2016) (cited in SC/EDF Br. 20). Neither case supports the conclusion that EPA wants the

Court to reach here: that the present-tense "meets" does not include the future-tense "will meet" in the scenario presented.

EPA and the Environmental Intervenors next argue that the statutory "context," 1 U.S.C. § 1, supports their view. EPA Br. 63; SC/EDF Br. 20-21. They are wrong.

Citing 42 U.S.C. § 7619, EPA argues that "Congress directed EPA to require air quality monitoring for all major metropolitan areas." EPA Br. 39. True enough. But the relevant portion of section 7407 does not require reference to data collected by those monitors. EPA admits that it has relied on modeling when making area designations. *Id.* at 41 n.11. It wants to leave the door open to its own use of modeling in the designation process but to close that door on the States.

The Court should not countenance that approach, particularly given that other portions of section 7407 expressly require reference to monitored data. *See* Texas Opening Br. 27 (citing 42 U.S.C. § 7407(d)(4)(B)(ii), (d)(6)(A)). In response to that point about the statutory text, EPA offers only a non sequitur based on the dates that subsections 7407(d)(4)(B)(ii) and (d)(6)(A) were added to the statute. EPA Br. 41 n.10. Under section 7407(d)(1), States and EPA may support area designations with more than just data collected by air-quality monitors, as EPA's own past practice reflects.

And importantly, the Texas Petitioners are not asking EPA to "set aside" or "ignore" the monitoring data showing a violation of the NAAQS in Bexar County. EPA Br. 38, 44; *see id.* at 19-20. They are asking the Court to require EPA to consider both that monitoring data and the modeling data that Texas put before it.

The monitoring data reflect that Bexar County would at most be a "marginal" nonattainment area. *See* Texas Opening Br. 5, 9. That means the applicable attainment timeline is three years. *See id.* The modeling reflects that Bexar County will attain the NAAQS within that three-year period without federal intervention. *See id.* at 8. Accordingly, when considered together, the relevant monitoring and modeling data reflect that, under section 7407(d)(1)(A)(ii) as construed in light of the Dictionary Act, Texas properly designated Bexar County attainment. EPA could modify that designation only after identifying a substantive flaw in the modeling.

Accepting that argument would not "read the marginal nonattainment classification out of the statute." EPA Br. 21, 64. A marginal nonattainment area is not an area that is expected to come into attainment within three years with no federally mandated controls. It is an area that is expected (and required) to come into attainment within three years in light of the statutory consequences of a nonattainment designation. *See* Texas Opening Br. 25-26. If a State cannot show that an area would register attainment within three years on its own, it cannot avoid a marginal nonattainment designation for that area. Accepting Texas's argument in this case would not change that.

The Environmental Intervenors also renew the Environmental Defense Fund's argument at the administrative stage based on section 7407(d)(3), but they fail to address the Texas Petitioners' responses. *See* Texas Opening Br. 28; SC/EDF Br. 20-21. Section 7407(d)(3)(E), the provision on which they focus, addresses redesignation of an area that has already been designated nonattainment. Accepting the Texas Petitioners' argument would not render that provision "superfluous."

SC/EDF Br. 21. Indeed, it would not change the operation of section 7407(d)(3) at all. And because section 7407(d)(3)(E) in particular addresses redesignation of non-attainment areas, the requirements that the Environmental Intervenors highlight make sense in that context. But those requirements, of course, do not apply when an area was not designated nonattainment in the first place.

EPA argues that "Texas cites to no case that has ever held that EPA may not rely exclusively on data from regulatory monitors to designate an area as nonattainment for the ozone NAAQS" and cites a D.C. Circuit case noting EPA's reliance on monitored data when making nonattainment designations. EPA Br. 43 (citing *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 158-59); *accord* SC/EDF Br. 25-26 n.17. But the D.C. Circuit has not considered the argument the Texas Petitioners present here. Nor, to the Texas Petitioners' knowledge, has any other court.

EPA concedes, as it must, that modeling is a recognized and relied-upon tool for predicting the future attainment or nonattainment status of an area. EPA Br. 54. The Clean Air Act confirms that. *E.g.*, 42 U.S.C. § 7511a(c)(2)(A). Texas therefore did not make a mere "promis[e]" or unsupported "predicti[on]" that Bexar County would be in attainment status within the relevant three-year period. EPA Br. 63. It cited the type of modeling that EPA itself relies on for air-quality predictions. C.I. No. 297 at 1, 4; *see* EPA Br. 54-55.

In arguing that the modeling shows only that Bexar County "*might*" meet the NAAQS within three years without federal intervention, SC/EDF Br. 11, 20, 28, the Environmental Intervenors misunderstand the data. They cite (at 20 n.13) Table 4-4 from the modeling report, which reflects projections based on "ambient data from

2010-2014 and the 2012 base modeling year." C.I. No. 314 at 21 (initial EPA technical support document); *see* SC/EDF Br. 26 (referencing this same portion of the report). But as EPA recognized, when the modeling was rerun "us[ing] ambient data from 2015-2017," it "project[ed] that the three Bexar County monitors will meet the 2015 NAAQS by 2020, with design values all lower than 71 ppb, and will all be well below the 2015 NAAQS by 2023." C.I. No. 314 at 21; *see* C.I. No. 297 at 4-7 (Table 4-5), 4-8 (Figure 4-2).

Of course, photochemical grid models are, by their very nature, "imperfect tools for predicting future air quality." *BCCA*, 355 F.3d at 832 (cited in EPA Br. 54). This Court has nonetheless recognized that "a modeled attainment demonstration 'provide[s] a reasonable expectation that the measures and procedures outlined will result in attainment of the NAAQS by [the statutory deadline].'" *Id.* (quoting a portion of the joint appendix in that case). As EPA states, "the modeling must be carefully used and scrutinized." EPA Br. 54. That is what the Texas Petitioners are saying EPA must do.

And again, the Texas Petitioners are not seeking "special" treatment. SC/EDF Br. 19. In arguing otherwise, the Environmental Intervenors state that "[i]n EPA's national designation rulemaking, every area of [the] country that had a monitor showing a violation received a nonattainment designation." *Id.* at 19. But there is no suggestion that, in those other instances, modeling of the type Texas relies on here supported different designations.

Finally, the present-tense "does not meet" language of section 7407(d)(1)(A)(i) (cited in EPA Br. 21, 38; SC/EDF Br. 13, 24 & n.16), adds nothing to EPA's and the

Environmental Intervenors' arguments. That language in the nonattainment-area provision is the converse of the "meets" language in section 7407(d)(1)(A)(ii), the attainment-area provision. If Texas is correct that the Dictionary Act applies in this scenario, Bexar County is properly viewed as an attainment area if it will meet the NAAQS within three years. It would fall within section 7407(d)(1)(A)(i) only if, contrary to the modeling data, EPA could show that it will not meet the NAAQS within those same three years.

b. EPA's fallback Dictionary Act argument is that, if the Act's tense provision applies here, Bexar County could have properly been designated attainment only if it had been in attainment status at the time of designation *and* would be in attainment status three years later. EPA Br. 65. Texas is aware of no support for that argument, which is based on a misreading of "as well as" in 1 U.S.C. § 1. The Act makes a statute phrased in the present tense apply to a future condition that does not currently exist. That is why, in *Catskill Development*, the court concluded that 25 U.S.C. § 2703(4) applied to lands that were not, but would be, held in trust by the United States. 547 F.3d at 126 (cited in Texas Opening Br. 24). Although EPA relied on *Catskill Development* in *Xcel*, it offers no response to the Texas Petitioners' reliance on it here. *Compare* EPA's *Xcel* P.I. Memorandum at 16 *with* EPA Br. vii-xii. There is no valid response.

D. EPA cannot seek refuge in the doctrine of *Chevron* deference.

As already noted, EPA concluded that the present-tense language of section 7407(d)(1)(A)(ii) compelled it to exclude the relevant modeling data from the scope of its modification review. *See* Texas Opening Br. 29. In other words, EPA stopped

at *Chevron* step one. *Id.* (citing *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002)); *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). For that reason, EPA's well-worn path of retreat to its *Chevron* bunker is, in this instance, blocked.

That may be increasingly true. *See, e.g.*, *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908 (2019) (Gorsuch, J., dissenting) (noting "the mounting criticism of *Chevron* deference); *see also* SC/EDF Br. 14-15 (wrongly suggesting that Texas itself claims deference). But even under current doctrine, EPA cannot manufacture ambiguity on judicial review after concluding that unambiguous statutory language compelled its challenged action. *Arizona*, 281 F.3d at 253-54. Nor can EPA gain anything from its guidance document. *See* EPA Br. 57. "Interpretations such as those in . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law . . . do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

And it should go without saying that any "extreme deference" EPA might claim when conducting a technical analysis, EPA Br. 77, could not extend to the Texas Petitioners' issue. Resolution of that issue does not depend on any scientific data or technical analysis that EPA is especially well suited to understand or perform. It turns on the questions of whether "necessary" and "appropriate" have different meanings in section 7407(d)(1)(B)(ii) and whether the Dictionary Act's tense provision applies in this scenario. Only if those questions are answered in the Texas Petitioners' favor would EPA engage in a technical analysis of the modeling data.

Finally, EPA's references to the Texas Petitioners' comments about agency discretion, *see, e.g.*, EPA Br. 52-53, 57 (quoting C.I. No. 364 at 2), 59, are misplaced in this portion of the brief. Those statements support Texas's alternative argument, presented in Part II of their opening brief. The Texas Petitioners turn to that argument next.

II. Even if "Necessary" and "Appropriate" Are Coterminous, EPA Erroneously Refused to Consider the Relevant Modeling Data.

In the alternative, the Texas Petitioners argue that, even if the Court discerns no difference between "necessary" and "appropriate" in section 7407(d)(1)(B)(ii), it should still conclude that EPA at least has discretion to designate Bexar County an attainment area based on the modeling data that Texas identified. *See* Texas Opening Br. 30-31 (citing *Catawba County*, 571 F.3d at 36-38); *see also Masias v. EPA*, 906 F.3d 1069, 1072 (D.C. Cir. 2018) (stating that, under section 7407(d)(1)(B), EPA "either promulgates the states' designations or modifies them as *appropriate*" (emphasis added), even though the applicable portion of the statute uses the term "necessary," not "appropriate").

EPA mischaracterizes that argument. The Texas Petitioners do not assert that "EPA is not necessarily required to consider projections of future air quality in making attainment designations." EPA Br. 43. They instead assert that, in the scenario presented here, EPA *is* required to consider modeling data that is relevant under section 7407(d)(1) as informed by the Dictionary Act. *See* Texas Opening Br. 30-31.

* * *

In closing, EPA suggests that the Texas Petitioners' objective is to delay the designation process. EPA Br. 64. That is not correct. As already noted, States are entitled to have their designations promulgated by EPA "as expeditiously as practicable," unless the statute necessitates modification by EPA. 42 U.S.C. § 7407(d)(1)(B)(i), (ii). Through this appeal, the Texas Petitioners are seeking to ensure that the Bexar County designation is correct. States are entitled to correct designations, even if initial errors by EPA cause delay.

CONCLUSION

The Court should grant the Texas Petitioners' petition for review and set aside the portion of the Challenged Action that designates Bexar County a nonattainment area. Additionally, for the reasons stated in the respondents' brief and Texas's respondents-intervenors' brief, the Court should deny the Sierra Club's petition for review.

Respectfully submitted.

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Certificate of Service

On April 12, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the parties' agreed briefing format because it contains 6,381 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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